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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 **PRESTON SMITH, an**
14 **individual,**
15 **Plaintiff,**

16 **vs.**

17 **CITY OF BURBANK,**
18 **BURBANK POLICE**
19 **DEPARTMENT, BURBANK**
20 **POLICE DEPARTMENT**
21 **OFFICER GUNN; BURBANK**
22 **POLICE DEPARTMENT**
23 **OFFICER BAUMGARTEN;**
24 **BURBANK DEPARTMENT**
25 **POLICE OFFICER EDWARDS,**
26 **AND DOES 1 TO 100, inclusive,**

27 **Defendants.**

Case No.: CV 10-8840 VBF (AGRx)

Honorable Valerie Baker Fairbank

**PLAINTIFF'S OPPOSITION TO
MOTION FOR JUDGMENT ON
THE PLEADINGS OF
DEFENDANTS CITY OF
BURBANK, BURBANK POLICE
DEPARTMENT AND OFFICERS
BAUMGARTEN AND EDWARDS**

**APPLICATION FOR AN ORDER
DENYING, DEFERRING OR
CONTINUING DEFENDANTS'
MOTION FOR JUDGMENT ON
THE PLEADING**

**DECLARATIONS OF PLAINTIFF
PRESTON SMITH AND MAX A.
SAULER, ESQ.,**

**MEMORANDUM OF POINTS
AND AUTHORITIES**

DATE: JUNE 20, 2011

TIME: 1:30 p.m.

COURTROOM: 9

1 **TO THE ABOVE ENTITLED COURT AND TO ALL DEFENDANTS**
2 **AND TO THEIR RESPECTIVE COUNSEL:**

3
4 **PLEASE TAKE NOTICE** that Plaintiff Preston Smith submits the instant
5
6 Opposition to the Motion for Judgment on the Pleading of Defendants City of
7 Burbank, Burbank Police Department and Officers Baumgarten and Edwards.
8
9 When matters outside the pleadings are presented to the court for consideration on
10 a Motion for Judgment on the Pleadings, as in this case, the Motion is converted to
11 a Rule 56 Summary Judgment Motion. (F.R.C.P., Rule 12(c).) This Opposition is
12 asserted on the grounds that there are triable issues of fact which preclude granting
13 the converted Judgment on the Pleadings.
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16 Plaintiff's Opposition is based on the attached Declarations of Preston Smith
17 and Max A. Sauler, Esq., of the Law Offices of Manuel H. Miller, and the attached
18 Memorandum of Points and Authorities.
19

20 **PLEASE TAKE FURTHER NOTICE** that Plaintiff Preston Smith hereby
21 applies to the above entitled court for an order either denying, deferring or
22 continuing the subject Motion for Judgment on the Pleadings until discovery is
23 complete. This application to deny, defer or continue the Defendant's Motion for
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1 Judgment on the Pleadings is made pursuant to F.R.C.P., Rule 56 (d), for good
2 cause shown, and was initially presented to the court on April 22, 2011.
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4
5 DATED: May 17, 2011

LAW OFFICES OF MANUEL H. MILLER

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8 By /s/ Max A. Sauler

9 Max A. Sauler, Esq.

10 Attorneys of Record of Plaintiff
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DECLARATION OF PRESTON SMITH

I, Preston Smith., declare and state as follows:

1. I am the Plaintiff in the above captioned action. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. On April 10, 2009 I was being questioned by City of Burbank Police Officers near a liquor store in the City of Burbank. After being questioned by the City of Burbank Police Officers I ran from the Police Officers.

3. I was apprehended by the Police Officers and was tasered in my low back by Officer Gunn and at which point I fell to the ground immobilized. While lying on the ground, in a face down position, I told Officer Gunn that "OK, you've got me." I remained face down on the ground and I did not attempt to move or stand up. Officer Gunn continued to taser me a second and third time, causing me to go into convulsions. While I was still immobilized on the ground, I begged Officer Gunn "please don't shock me again." In response, Officer Gunn told me "f---k you, asshole, how do you like that, that will teach you to run," at which time

1 Officer Gunn tasered me a fourth and fifth time. Officer Gunn tasered me again
2 and then hit me a number of times with his flashlight.
3

4 4. City of Burbank Police Officer Baumgarten smashed his knee into my
5 back area. I do not at this point recall specifically what Officer Edwards did
6 although he was present.
7

8
9 I declare under penalty of perjury pursuant to the laws of the State of
10 California that the foregoing is true and correct.
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12
13 Executed this 17th day of May, 2011, at Castaic, California.
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18 By /s/ Preston Smith
19 Preston Smith
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DECLARATION OF MAX A. SAULER, ESQ.

I, Max A. Sauler, Esq., declare and state as follows:

1. I am an attorney licensed to practice law before the above entitled court. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. This action arises out of the alleged actions of Defendant police officers Gunn, Baumgarten and Edwards, and their employer/Defendant Burbank Police Department, in the course of, during and after the arrest of Plaintiff. This case was initially filed in the Los Angeles Superior Court and removed to this court at the request for removal by Defendants.

3. This case was set for trial to commence on November 8, 2011. Following Plaintiff's notice of the depositions of Defendants Gunn, Baumgarten and Edwards by Plaintiff, counsel for Defendants advised counsel for Plaintiff that because of an on-going Internal Affairs Investigation of the Defendant police officers arising out of the events giving rise to this lawsuit, the Defendants would not testify because of the potential for violations of their 5th Amendment rights.

1 4. Given the inability of Plaintiff to complete his discovery, the parties
2 entered into a Stipulation vacating the trial and vacating all pre-trial dates, which
3 was executed by this court on March 1, 2011.
4

5 5. As part of the Stipulation (Para. 9 of the Stipulation) the court was
6 advised that, notwithstanding the proposed Stay, the Defendants wished to proceed
7 with the filing and hearing of Motions pursuant to F.R.C.P., Rule 12(c) on the issue
8 of whether the instant action is barred by *Heck vs. Humphrey* 512 U.S. 447, 114
9 S.Ct. 2364 (1994).
10

11 6. In the same Stipulation (Para. 10) the court was advised of Plaintiff's
12 contrary position, that the depositions of the individual Defendant police officers
13 must be completed before Plaintiff can oppose the Defendants *Heck* Motions. The
14 Order vacating the trial provided that Defendants *Heck* Motions would be heard on
15 May 16, 2011.
16

17 7. The Stay Order issued by this court only permits the Defendants to
18 move for Judgment on the Pleadings based on whether the instant action is barred
19 by *Heck vs. Humphrey* 512 U.S. 447, 114 S.Ct. 2364 (1994).¹ Any other reasons
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24 ¹ The March 1, 2011 Order Staying the Case provided that "4. Defendants are
25 permitted to file motions pursuant to Rule 12(c) of the Federal Rules of Civil
26 Procedure, focused on whether Plaintiff's claims are barred by his conviction for
27 violating California Penal Code § 148(a)(1) under the doctrine set forth in *Heck vs.*
28

1 set forth in the subject Motion for Summary Judgment that goes beyond the issue
2 of whether the instant action is barred by the holding in *Heck vs. Humphrey* raises
3 issues beyond that expressly permitted by the court and should therefore be denied.
4

5 8. Furthermore, the court permitted Defendants *Heck* motions to be
6 heard on May 16, 2011. Setting the hearing for Defendants *Heck* motion beyond
7 May 16, 2011 violates the court explicit stay order.
8

9 9. Plaintiff's counsel has been advised that the Internal Affairs
10 investigation arising out of the same set of facts giving rise to this action is still on-
11 going. After receipt of the Defendant's Motion for Judgment on the Pleadings the
12 undersigned faxed to Defendant's counsel his request that in view of the filing of
13 the *Heck* Motion that Plaintiff be permitted to depose the Defendant police
14 officers. Counsel for Defendant Gunn responded that he would not permit his
15 client to be deposed.
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19 10. Plaintiff is unable to completely and substantively respond to
20 Defendant's *Heck* Motion for Judgment on the Pleadings without being able to
21 present the deposition testimony of the Defendant Police Officers. The
22 Defendant's *Heck* Motion is based on events that transpired in the course of,
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26 *Humphrey* ... hereinafter "the *Heck* motions". The *Heck* motions shall be heard
27 on May 6, 2011."
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1 during and after the arrest of Plaintiff. The Ninth Circuit case of *Hooper vs.*
2 *County of San Diego*, 629 F.3d 1127 (9th Cir. 2011) [cited by Defendant Gunn in
3 his Motion for Judgment on the Pleadings] holds that facts surrounding the arrest,
4 and not merely the plea entered by the criminal defendant, may be considered by
5 the court in ruling on a *Heck* motion, depending on the circumstances of the arrest
6 and the alleged excessive force claim. Without the deposition testimony of the
7 Defendant Police Officers the Plaintiff is unable to fully and completely respond to
8 the Defendant's *Heck* Motion for Judgment on the Pleadings. Without their
9 deposition testimony, the Plaintiff is unable to inform the court of the facts and
10 circumstance of his arrest and the excessive force committed by the Defendants
11 during his arrest. Without this excessive force evidence, the court is unable to
12 make a determination whether "success in [Plaintiff's] § 1983 claim that excessive
13 force was used during [his] arrest would necessarily imply or demonstrate the
14 invalidity of [his] conviction under § 1248 (a) (1)." Whether the chain of events
15 of his arrest and Plaintiff's claim of excessive force is, or is not, one continuous
16 transaction, or whether it makes any difference given the holding in *Hooper*,
17 cannot be determined without the depositions of the Defendant Police Officers.

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11. In order to present the court with evidence of the events that
transpired during his arrest, the depositions of the Defendant Police Officers are

1 absolutely necessary. Without the testimony that the Defendant Police Officers
2 will provide the Plaintiff is unable to present material evidence of what transpired
3 during the course of his arrest and the continuing nature of the arrest, and is
4 therefore unable to fully and completely respond to the Defendant's *Heck* Motion
5 for Judgment on the Pleadings.
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7
8 12. For all of the foregoing reasons, Plaintiff applies to this court for an
9 order either deny, deferring or continuing the Defendant's *Heck* Motion to a future
10 date following the completion of the Internal Affairs investigation and after
11 Plaintiff has had an opportunity to depose Defendants Gunn, Baumgarten and
12 Edwards. This application was initially present to the court on April 22, 2011, and
13 after attempting to resolve this issue with defense counsel.
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18 I declare under penalty of perjury pursuant to the laws of the State of
19 California that the foregoing is true and correct.
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21
22 Executed this 17th day of May, 2011, at Woodland Hills, California.
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25 By /s/ Max A. Sauler
26 Max A. Sauler, Esq.
27

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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4 **I**

5 **UPON GOOD CAUSE SHOWN THE COURT MAY DEFER OR**
6
7 **CONTINUE A MOTION FOR JUDGMENT ON THE PLEADINGS**
8

9 Defendants City of Burbank, Burbank Police Department and Officers
10 Baumgarten and Edwards filed a F.R.C.P., Rule 12(c) Motion for Judgment on the
11 Pleadings and as part of that Motion asks that the court rely on documents beyond
12 the face of the Complaint. Defendants rely on the misdemeanor complaint, the
13 sentencing memorandum, the misdemeanor plea and the court transcript at which
14 Plaintiff entered his plea in support of his Motion for Judgment on the Pleadings,
15 all matters outside the scope of the pleadings. When matters outside the pleadings
16 are presented to the court for consideration on a Motion for Judgment on the
17 Pleadings, the motion is converted into a Rule 56 Summary Judgment Motion. *Hal*
18 *Roach Studios, Inc. vs. Richard Feiner & Co.* (9th Cir. 1990) 896 F.2d 1542, 1550.
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24 F.R.C.P., Rule 12(d) provides:

25 “RESULT OF PRESENTING MATTERS OUTSIDE
26
27 THE PLEADINGS. If, on a motion under Rule 12(b)(6)
28

1 or 12 (c), matters outside the pleadings are presented to
2 and not excluded by the court, the motion must be treated
3 as one for summary judgment under Rule 56. All parties
4 must be given a reasonable opportunity to present all the
5 material that is pertinent to the motion.”
6
7

8 A Motion for Judgment on the Pleadings (that is converted to a Rule 56
9 Summary Judgment Motion) is subject to being deferred or continued (or denied)
10 to permit the opposing party to obtain material discovery.
11

12 F.R.C.P. Rule 56 (d) provides:
13

14 “When facts are unavailable to the nonmovant, if a
15 nonmovant shows by affidavit or declaration that, for
16 specified reasons, it cannot present facts essential to
17 justify its opposition, the court may:
18

- 19
20 (1) defer considering the motion or deny
21 it;
22
23 (2) allow time to obtain affidavits or
24 declarations or to take discovery; or
25
26 (3) issue any other appropriate order.”
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II

A STATE COURT CONVICTION FOR RESISTING

ARREST MAY NOT BAR A SECTION 1983 CLAIM

FOR EXCESSIVE FORCE

The United States Supreme Court held in *Heck vs. Humphrey* 512 U.S. 447, 114 S.Ct. 2364 (1994) that where a criminal conviction arises out of the “same facts” as the basis for a subsequent 42 U.S.C. § 1983 claim, the 1983 claim must be dismissed. The Ninth Circuit has held that application of the *Heck* bar rests on finding that the criminal conviction (here for violation of California *Penal Code* § 148(a) for resisting arrest) arises out of the “same facts” as the 1983 claim. *Hooper vs. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011).

Just as in the case as bench, the plaintiff in *Hooper* did not contest her guilty plea for violating Section 148(a)(1) nor did she dispute the lawfulness of her arrest. As with Plaintiff Smith, the *Hooper* plaintiff did contend that the defendant police officers used excessive force in response to her resistance.

Here, as pointed out in Section I, *supra*, discovery has not yet been conducted by Plaintiff as to the conduct of the Defendants City of Burbank, Burbank Police Department and Officers Baumgarten and Edwards. Therefore, the

1 Plaintiff has not yet conducted discovery material to the factual issues that form the
2 basis of Defendant's *Heck* Motion. Even absent this evidence, it is Plaintiff's
3 position that the factual circumstance giving rise to his excessive force claim is
4 separate and apart from the factual basis giving rise to his plea and conviction for
5 resisting arrest, and therefore, his claims for violation of 42 U.S.C. § 1983 and
6 California *Civil* Code § 52.1, and his causes of action for Intentional Infliction of
7 Emotional Distress and Assault and Battery, are not barred by the *Heck* decision.
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11 In this case, Plaintiff Preston Smith resisted arrest by fleeing the officers; he
12 resisted, delayed or obstructed Defendant Police Officers Gunn, Baumgarten and
13 Edwards. Once the Defendant Officers had control of Preston Smith he was
14 tasered even though the Plaintiff was under their physical control and was not
15 resisting arrest, giving rise to Plaintiff's claims.
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18 In *Hooper, supra*, the court recognized that:

19
20 "[T]he California Supreme Court held that a conviction
21 under § 148(a)(1) can be valid even, if, in a single
22 continuous chain of events, some of the officer's conduct
23 was unlawful. *Yount vs. City of Sacramento*, 43 Cal.4th
24 885, 76 Cal.Rptr.3d 787 (2008). According to the Court,
25 a conviction under § 148(a)(1) requires only that some
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1 lawful police conduct was resisted, delayed, or obstructed
2 during the continuous chain of events.” (629 F.3d at
3 1131.)
4

5 The *Hooper* court went on to recognize that *Yount* held that the plaintiff’s
6 “...claim was not *Heck*-barred because § 148(a)(1) contains no requirement that
7 there be a distinct temporal separation between the use of reasonable force and the
8 use of excessive force. If, at some time during the ‘continuous transaction’
9 between an individual an officer, the individual ‘resists, delays, or obstructs’, the
10 officer in the lawful performance of his or her duty, that is a violation of §
11 148(a)(1). The individual’s ‘resisting, delaying or obstructing’, the officer does
12 not lose its character as a violation of § 148(a)(1) if, at some other time during the
13 same ‘continuous transaction,’ the officer uses excessive force or otherwise acts
14 unlawfully.” (629 F.3d at 1132.) [Emphasis added.]
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20 The *Hooper* court determined that “[t]he question before us is the basic *Heck*
21 question – whether success in *Hooper*’s § 1983 claim that excessive force was used
22 during her arrest ‘would necessarily imply’ or ‘demonstrate’ the invalidity of her
23 conviction under § 148(a)(1). Given California law, as clarified in *Yount*, we hold
24 that it would not.” (629 F.3d at 1133.)
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1 The factual issues raised by Plaintiff's excessive force claims, and whether
2 they are *Heck*-barred, must be viewed in a light most favorable to the party
3
4 opposing the defendant's Motion (whether it is a Motion is for Summary
5 Judgment, or, as here, is Motion for Judgment on the Pleading that is converted to
6 a Motion for Summary Judgment).
7

8 Defendants argue that in the case at bench, "[i]n this action, the criminal
9 record prevents Plaintiff from making the same argument. The criminal record
10 demonstrates that Plaintiff violated *Penal Code* § 148(a)(1) during the entire period
11 of time that he interacted with Offices Baumgarten and Edwards." [Motion for
12 Judgment on the Pleadings, 10:1 - 4.] That is not the case. Other than the
13
14 attached Smith Declaration, the record before this court does not resolve the
15 chronology of Plaintiff fleeing the officers, the factual issues of the timing of the
16
17 sequence of events during the numerous times Smith was tasered or which of the
18
19 Defendant Officers were present and violating Plaintiff's civil rights. In fact, the
20
21 record presented by the moving parties does not even mention whether Officers
22
23 Baumgarten or Edwards tasered the Plaintiff or participated with Officer Gunn in
24
25 restraining the Plaintiff and/or tasing him, why the Plaintiff was tasered, how
26
27 many times he was tasered or when in the course of the chase, detention and arrest
28 the Plaintiff was tasered by Defendant Officers. Nor does the record resolve the

1 issues raised in the Complaint relative the training, or lack thereof, of Defendants
2 City of Burbank and the Burbank Police Department of its police officers relative
3 to its arrest and tasing procedures. Likewise, the record does not resolve the
4 excessive force issues alleged to have been perpetrated on the Plaintiff by the
5 moving parties. All of these factual issues have to be addressed before a full
6 hearing on Defendant's *Heck* Motion may be had.
7

8
9 The *Hooper* court unequivocally held that:
10

11 "[W]e conclude that a conviction under California
12 Penal Code § 148(a)(1) does not bar a § 1983 claim for
13 excessive force under *Heck* when the conviction and the
14 § 1983 claim are based on different actions during 'one
15 continuous transaction.'" (629 F.3d at 1133.)
16
17

18 The *Hooper* case stands for the proposition that there need not be a distinct
19 temporal separation in the "continuous transaction." Therefore, an arrest might be
20 initially lawful and later use of excessive force is actionable and not barred by
21 *Heck*.
22
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24 At the very least, the facts in the case at bench present triable issues of fact
25 preventing entry of either a Judgment on the Pleadings or a Summary Judgment.
26

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III

CONCLUSION

For all of the foregoing reasons, this court should deny Defendant's Motion for Judgment on the Pleadings or, in the alternative, defer or continue Defendant's Motion pending completion of the depositions of the Defendants City of Burbank, Burbank Police Department and Officers Baumgarten and Edwards.²

DATED: May 17, 2011

LAW OFFICES OF MANUEL H. MILLER

By /s/ Max A. Sauler
Max A. Sauler, Esq.
Attorneys of Record of Plaintiff

² As the court is aware, a Heck Motion for Judgment on the Pleadings on the same grounds was brought by Defendant Gunn and denied by this court.

Pearlman, Brianna

From: cacd_ecfmail@cacd.uscourts.gov
Sent: Tuesday, May 17, 2011 8:56 AM
To: ecfnef@cacd.uscourts.gov
Subject: Activity in Case 2:10-cv-08840-VBF -AGR Preston Smith v. City of Burbank et al
Objection/Opposition (Motion related)

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UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

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Case Name: Preston Smith v. City of Burbank et al

Case Number: 2:10-cv-08840-VBF -AGR

Filer: Preston Smith

WARNING: CASE CLOSED on 03/01/2011

Document Number: 34

Docket Text:

OPPOSITION OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS OF DEFENDANTS CITY OF BURBANK, BURBANK POLICE DEPARTMENT, BURBANK POLICE OFFICERS BAUMGARTEN AND EDWARDS re: MOTION for Judgment on the Pleadings as to all claims[32] filed by Plaintiff Preston Smith. (Miller, Manuel)

2:10-cv-08840-VBF -AGR Notice has been electronically mailed to:

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